



The Foreign Sovereign Immunities Act
2009 Year in Review

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The Foreign Sovereign Immunities Act: 2009 Year in Review

by Crowell & Moring LLP*

Table of Contents

Introduction: The FSIA in 2009.....	1
I. A Brief History of the FSIA.....	3
II. The Definition of a Foreign State: Political Subdivisions, Organs, Agencies and Instrumentalities.....	4
A. What Is a “Foreign State”?	4
1. Entities That Qualified as a Foreign State or Agency or Instrumentality of a Foreign State	5
2. Individual Foreign Officials.....	6
B. “Governmental” Versus “Commercial” Agencies and Instrumentalities: the “Core Functions Test”.....	9
III. Exceptions to the General Grant of Immunity	9
A. Waiver – § 1605(a)(1).....	10
1. Explicit Waiver	10
2. Implicit Waiver	10
B. Commercial Activity – § 1605(A)(2)	11
1. What Acts Are Considered Commercial?.....	12
2. What Acts Create a Sufficient Nexus with the United States?	16
C. Takings – § 1605(a)(3).....	21
D. Non-Commercial Torts – § 1605(a)(5).....	23
E. Arbitration – § 1605(a)(6).....	25
F. Terrorism – § 1605A, § 1605 (a)(7), and other claims	26
1. Implementation of § 1605A	26
2. Dismissal of Claims Against Specific Nations	30
G. Counterclaim – § 1607.....	31
IV. Enforcement of Awards Against Foreign Sovereigns	32
A. The Commercial Activity Exception to Immunity from Attachment.....	32
B. The Terrorism Exception: Terrorism Risk Insurance Act (“TRIA”) and Blocked Assets.....	33

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V.	Practical Issues in FSIA Litigation	34
A.	Service of Process	34
B.	Personal Jurisdiction	36
C.	Default Judgments	36
D.	Forum Non Conveniens	38

The Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602 et seq. (“FSIA”), provides the exclusive basis for suing a foreign sovereign in United States courts. While the FSIA generally grants immunity to foreign sovereigns, it also lays out a number of exceptions under which U.S. courts can exercise jurisdiction. Plaintiffs have thus used this statute as a basis to sue foreign governments and their agencies and instrumentalities in a variety of contexts, ranging from purely commercial disputes to wrongful death claims on behalf of victims of state-sponsored terrorism. The purpose of this Review is to provide an overview of the primary areas of litigation under the FSIA through an analysis of judicial decisions under the statute issued in 2009.

Introduction: The FSIA in 2009

Litigation involving the Foreign Sovereign Immunities Act (FSIA) continues to be an active and dynamic area of the law. In 2009, the number of published opinions issued in United States federal courts remained consistently high, with over 120 published decisions over the course of the year, including two opinions by the Supreme Court.

As in years past, FSIA decisions in 2009 addressed claims in high-profile, politically-charged cases, involving, for example, claims against the Holy See by victims of sexual abuse by Roman Catholic priests, claims by relatives of Holocaust survivors against sovereign states and state-owned museums seeking restitution for art stolen by the Nazi Regime and later acquired by the defendants, and claims against Iraq for acts of terrorism carried out by the Saddam Hussein regime, to name just a few.

As in Crowell & Moring’s 2008 Year in Review, this review addresses the core issues affecting foreign sovereigns that are parties to litigation in courts in the United States:

- Who or what is considered a “foreign state” subject to the FSIA?
- Under what circumstances will a foreign state lose its otherwise generally granted sovereign immunity?
- What are the rules on attaching a foreign sovereign’s assets located within the United States?

The Review also includes a short introduction to the FSIA as well as some practical guidance for foreign sovereigns based on the most recent FSIA decisions. If you have any questions about the FSIA, please feel free to contact the members of Crowell & Moring’s International Litigation Team:

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I. A Brief History of the FSIA

Foreign sovereigns have enjoyed immunity from suit in U.S. courts for nearly two centuries. As early as 1812 in *Schooner Exchange v. McFaddon*,¹ U.S. courts generally declined to assert jurisdiction over cases involving foreign government defendants, a practice rooted in a sense of “grace and comity” between the U.S. and other nations. Judges instead deferred to the views of the Executive Branch as to whether such cases should proceed in U.S. courts, exercising jurisdiction only where the U.S. State Department expressly referred claims for their consideration.²

In 1952, U.S. courts’ jurisdiction over claims against foreign states and their agents expanded significantly when the U.S. State Department issued the so-called “Tate Letter,” announcing the Department’s adoption of a new “restrictive theory” of foreign sovereign immunity³ to guide courts in invoking jurisdiction over foreign sovereigns. The “Tate Letter” directed that state sovereigns continue to be entitled to immunity from suits involving their sovereign, or “public,” acts. However, acts taken in a commercial, or “private,” capacity no longer would be protected from U.S. court review. Yet, even with this new guidance, courts continued to seek the Executive Branch’s views on a case-by-case basis to determine whether to assert jurisdiction over foreign sovereigns – a system that risked inconsistency and susceptibility to “diplomatic pressures rather than to the rule of law.”⁴

In 1976, Congress sought to address this problem by enacting the FSIA, essentially codifying the “restrictive theory” of immunity, and empowering the courts to resolve questions of sovereign immunity without resort to the Executive Branch.⁵ Today, the FSIA provides the “sole basis” for obtaining jurisdiction over a foreign state in U.S. courts.⁶

The FSIA provides that “foreign states” – including their “political subdivisions” and “agencies or instrumentalities”⁷ – shall be immune from the jurisdiction of U.S. courts unless one of the exceptions to immunity set forth in the statute applies.⁸ The FSIA includes several provisions that define the scope of a foreign state’s immunity, and establishes detailed procedural requirements for bringing claims against a sovereign defendant.

¹ 11 U.S. (7 Cranch) 116 (1812).

² See *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983) (explaining history of the FSIA).

³ *Id.* at 486-87.

⁴ *In re Terrorist Attacks on September 11, 2001*, 538 F.3d 71, 82 (2d Cir. 2008) (quoting *Chuidian v. Philippine Nat’l Bank*, 912 F.2d 1095, 1100 (9th Cir. 1990)).

⁵ 28 U.S.C. § 1602 (2009).

⁶ *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439 (1989).

⁷ 28 U.S.C. § 1603.

⁸ See *id.* § 1604.

The exceptions to immunity are set forth in sections 1605 and 1605A of the FSIA. These exceptions include, *inter alia*, certain claims based on commercial activities, expropriation of property, and tortious or terrorist acts by foreign sovereign entities. In most instances, where a claim falls under one of the FSIA exceptions, the Act provides that the foreign state shall be subject to jurisdiction in the same manner and to the same extent as a private individual.⁹ The FSIA also includes separate provisions establishing immunity (and exceptions to immunity) from the attachment of property located in the United States in aid of execution of a judgment against a foreign state or its agencies or instrumentalities.¹⁰ Finally, the FSIA sets forth various unique procedural rules for claims against foreign states, including, *e.g.*, special rules for service of process, default judgments and appeals.¹¹

II. The Definition of a Foreign State: Political Subdivisions, Organs, Agencies and Instrumentalities

A threshold issue in any FSIA case is whether the defendant person or entity qualifies as a “foreign state” and therefore is entitled to immunity. For purposes of the FSIA, “foreign states” include not only the states themselves, but also agencies and instrumentalities thereof.¹² To qualify as an “agency or instrumentality” of a foreign state, an entity must be a “separate legal person,” that is “neither a citizen of a State of the United States . . . nor created under the laws of any third country” *and* either “an organ of a foreign state or political subdivision” or an entity “a majority of whose shares or other ownership interest is owned by a foreign state or a political subdivision thereof.”¹³

A. What Is a “Foreign State”?

Whether an entity qualifies as a foreign state is a fundamental inquiry in any FSIA case because it dictates whether the court will be able to assert jurisdiction over the claim. If an entity is deemed to be a foreign state, it may be sued in a U.S. court only if the claim falls within one of the exceptions set forth in the statute.

Determining whether an entity is a “foreign state” and therefore entitled to the protections of the FSIA is a fact specific inquiry, involving careful attention to the specific nature and functions of the defendant. In 2009, the following decisions illustrate how U.S. courts have addressed the status of a variety of entities under the FSIA.

⁹ *See id.* § 1606; *but see* 28 U.S.C. § 1605A (providing a federal statutory cause of action for terrorism-related acts).

¹⁰ *See id.* §§ 1610-1611. For example, property belonging to a foreign central bank or monetary authority and held for its own account is immune from suit absent a waiver. *Id.* § 1611(b)(1). Likewise, military property held by a military authority and used or intended to be used in connection with a military activity is immune from attachment. *Id.* § 1611(b)(2).

¹¹ *See, e.g.*, 28 U.S.C. §§ 1605(g), 1608.

¹² 28 U.S.C. § 1603(a).

¹³ *Id.* § 1603(b).

1. Entities That Qualified as a Foreign State or Agency or Instrumentality of a Foreign State

National and Vatican Banks. In *Alperin v. Vatican Bank*, the Ninth Circuit affirmed the dismissal of a class action suit against the Vatican Bank, also known officially as Istituto per le Opere di Religione (“IOR”), finding that the entity is an “organ” of the Vatican and, therefore, an “agency or instrumentality” of a sovereign state entitled to immunity.¹⁴ The appellate court examined the following factors to determine whether the IOR was an organ of the foreign state:

- [1] the circumstances surrounding the entity’s creation,
- [2] the purpose of its activities,
- [3] its independence from the government,
- [4] the level of government financial support,
- [5] its employment policies, and
- [6] its obligations and privileges under state law.¹⁵

The court held that, based on an affidavit describing its “status, structure, and role under Vatican law,” the IOR established a *prima facie* case that it is an agency or instrumentality of the Vatican.¹⁶ Specifically, the Pope created the IOR “as a public and independent juridic entity that is responsible for managing assets placed in its care for the purpose of supporting religious or charitable works,” and the IOR maintains exclusive control over a number of obligations established under Vatican law.¹⁷ Moreover, the Vatican appoints the high-ranking government officials seated at the highest administrative level of the IOR.¹⁸ Finally, the court noted that, under Italian law, the IOR is immune from suit in Italy as a foreign sovereign.¹⁹ Based on these factors, the court held that the IOR was entitled to immunity under the FSIA as an agency or instrumentality of the Vatican.²⁰

Police Services. In *A.R. International Anti-Fraud System, Inc. v. Pretoria National Central Bureau of Interpol*, the United States District Court for the Eastern District of California held that defendant Interpol Pretoria was a foreign state within the meaning of the FSIA.²¹ Specifically, the court found that Interpol Pretoria, as a member of the International Criminal Police Organization “Interpol,” is “a section of the South African Police Service and part of the

¹⁴ 360 F. App’x 847, 849 (9th Cir. 2009).

¹⁵ *Id.* (citing *Cal. Dep’t of Water Res. v. Powerex Corp.*, 533 F.3d 1087, 1102 (9th Cir. 2008)).

¹⁶ *Id.* at *2.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ 634 F. Supp. 2d 1108, 1113-14 (E.D. Cal. 2009).

government of the Republic of South Africa,” and, therefore, is entitled to a presumption of statutory immunity from suit.²²

Foreign Consulates. In *Box v. Dallas Mexican Consulate General*, the United States District Court for the Northern District of Texas determined that the Mexican Consulate General located in Dallas, Texas, “is a separate legal entity, is an organ of Mexico, and is neither a citizen of a State of the United States nor created under the laws of a third country.”²³ The court did not find it necessary to engage in any analysis as to whether the entity was a “foreign state” or “an agency or instrumentality of a foreign state,” concluding instead that the Mexican Consulate General was both and therefore subject to the immunity protections of the FSIA.²⁴

2. Individual Foreign Officials

As discussed in Crowell & Moring’s 2008 Review, courts have taken different approaches in determining whether the immunity of individual officers of a foreign state is governed by the FSIA or by other sources of immunity such as international treaty or common law. In 2008, in *In re Terrorist Attacks on September 11, 2001*, the Second Circuit held that an individual official of a foreign state acting in his official capacity is an “agency or instrumentality” of the state and therefore protected under the FSIA.²⁵ Other courts, however, have held that the immunity of foreign state officials is not governed by the FSIA, but rather is governed by the Vienna Convention on Diplomatic Relations. In 2009, the debate continued.²⁶

Former Foreign Officials. In *Yousuf v. Samantar*,²⁷ the Fourth Circuit held that the FSIA does not apply to individual foreign government agents, including former government agents, who are sued in their official capacity.²⁸ In *Yousuf*, natives of Somalia brought suit against a high ranking government official for alleged acts of torture and human rights violations committed against them by soldiers under his command.²⁹ The district court dismissed the claims, finding that the defendant official enjoyed immunity under the FSIA, and plaintiffs

²² *Id.* at 1114.

²³ No. 3:08-cv-1010-0, 2009 WL 3163551, at *1 (N.D. Tex. Sept. 30, 2009).

²⁴ *Id.*

²⁵ 538 F.3d 71, 81 (2d Cir. 2008).

²⁶ In June 2010, after initial publication of this 2009 Year in Review, the Supreme Court resolved the debate and held in *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010), that the immunity of foreign state officials is *not* governed by the FSIA. A discussion of this case will be included in the 2010 Year in Review.

²⁷ 552 F.3d 371, 381 (4th Cir. 2009).

²⁸ The Fourth Circuit determined that, even if the FSIA applied to individuals, Congress did not intend that it shield former government agents from suit. Citing *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003), the appellate court held that the agency or instrumentality status is determined at the time that the action is brought. *Yousuf*, 552 F.3d at 382-83.

²⁹ *Id.* at 373.

appealed.³⁰ The Fourth Circuit reversed, holding that Congress did not intend to shield individual foreign government agents from suit under the FSIA.³¹ The court reasoned that sections 1603(a) and (b) and the overall structure of the FSIA demonstrated Congress’s intent to shield only business entities.³² Specifically, the court agreed with the Seventh Circuit’s analysis that the term “separate legal person” has the “ring of the familiar legal concept that corporations are persons, which are subject to suit,” and therefore “the FSIA’s use of the phrase ‘separate legal person’ suggests that corporations or other business entities, but not natural persons, may qualify as agencies or instrumentalities.”³³ The court found additional support for its holding in the statute’s legislative history, as well as the requirement that the “entity” be “neither a citizen of a State of the United States as defined in section 1332(c) and (e) [of Title 28], nor *created* under the laws of any third country” – language which the court found to clearly relate to corporate entities.³⁴

In *Matar v. Dichter*, the defendants argued that *former* foreign officials are entitled to immunity under the FSIA.³⁵ In *Matar*, survivors of an Israeli military attack on a suspected terrorist sued the former head of the Israeli Security Agency, alleging war crimes and violations of international law.³⁶ The trial court had dismissed the complaint on the grounds that the defendant, as a foreign official, was immune from suit under the FSIA.³⁷ On appeal, the plaintiff argued that the FSIA does not apply because the defendant is no longer a foreign official.³⁸ Specifically, the plaintiff relied on the Supreme Court’s 2003 opinion in *Dole Food Co. v. Patrickson*, which established that a corporation’s “instrumentality status [is] determined at the time suit is filed,”³⁹ arguing that this principle should extend to individual officials as well.⁴⁰ Ultimately, the Second Circuit elected not to decide the issue, finding the defendant immune under principles of common law. The court held that “the common law of foreign sovereign immunity recognized an individual official’s entitlement to immunity for ‘acts performed in his official capacity.’”⁴¹ The court then concluded that “[a]n immunity based on acts – rather than status – does not depend on tenure in office.”⁴² The court further noted that, before to the

³⁰ *Id.*

³¹ *Id.* at 380-81.

³² *Id.* at 378-81.

³³ *Id.* at 380 (citing *Enahoro v. Abubakar*, 408 F.3d 877, 881-82 (7th Cir. 2005)).

³⁴ *Id.*

³⁵ 563 F.3d 9, 12 (2d Cir. 2009).

³⁶ *Id.* at 10-11.

³⁷ *Id.* at 11; *Matar v. Dichter*, 500 F. Supp. 2d 284 (S.D.N.Y. 2007).

³⁸ 563 F.3d at 12.

³⁹ *Id.* (citing *Dole Food Co. v. Patrickson*, 538 U.S. 468, 478 (2003)).

⁴⁰ *Id.*

⁴¹ *Id.* at 14 (citations omitted).

⁴² *Id.*

enactment of the FSIA, courts deferred to the decision of the Executive on matters of sovereign immunity. Because the Department of State filed a “Statement of Interest in the district court specifically recognizing the [defendant’s] entitlement to immunity,” the court similarly found the defendant immune from suit under principles of common law.⁴³

Diplomats. In *Swarna v. Al-Awadi*, a former live-in domestic servant filed suit against the State of Kuwait and her former employers – a diplomat serving at the Permanent Mission of the State of Kuwait to the United Nations and his wife.⁴⁴ The plaintiff sought damages under New York’s labor laws and the Alien Torts Statute for subjecting her to slavery and slavery-like practices including involuntary servitude, forced labor, assault, and sexual abuse.⁴⁵ The court held that the individual defendants were not entitled to immunity under either the FSIA or the Vienna Convention on Diplomatic Relations because the alleged acts were private acts, not “performed . . . in the exercise of [the diplomat’s] functions as a member of the mission.”⁴⁶ Thus, while the court held that the FSIA applies generally to claims against foreign officials, immunity did not attach because the acts alleged were carried out by the defendants in their personal (non-official) capacities.

Consular Officials. In *Johnson v. U.K. Government*, the United States District Court for the District of Connecticut was faced with the question of whether a consular official is entitled to immunity under the FSIA.⁴⁷ The district court held that the official was immune under the Vienna Convention for Consular Relations and declined to address whether the FSIA applies to consular officials.⁴⁸

New Proposed Legislation. The debate regarding individual immunity under the FSIA may be resolved by the Justice Against Sponsors of Terrorism Act,⁴⁹ a bill introduced in Congress on December 23, 2009, by Senator Arlen Specter, along with co-sponsors Senator Charles Schumer and Senator Lindsey Graham.⁵⁰ The Act, among other things, seeks to amend § 1604, the FSIA’s general provision of immunity, to provide that a claim against an official or employee of a state or organ thereof, acting within the scope of office or employment, shall be asserted against the state itself.⁵¹ As of 2010, the proposed bill has not yet been passed by Congress.

⁴³ *Id.*

⁴⁴ *Swarna v. Al-Awadi*, 607 F. Supp. 2d 509, 511 (S.D.N.Y. 2009).

⁴⁵ *Id.* at 512.

⁴⁶ *Id.* at 518, 522 (citing *Vienna Convention on Diplomatic Relations* (“VCR”), Apr. 18, 1961, 23 V.S.T. 3227, 500 V.N.T.S. 95, Art. 39(2)).

⁴⁷ 608 F. Supp. 2d 291, 295-96 (D. Conn. 2009).

⁴⁸ *Id.*

⁴⁹ S. 2930, 111th Cong. (2009).

⁵⁰ *Id.*

⁵¹ S. 2930 § 4.

B. “Governmental” Versus “Commercial” Agencies and Instrumentalities: the “Core Functions Test”

An “agency or instrumentality” of a foreign sovereign is subject to different statutory rules than the “foreign state” itself as to certain issues. In particular, rules relating to service of process, venue, the availability of punitive damages, and attachment of assets differ depending on whether the defendant is deemed an agency of the state or the state itself.⁵² Thus, a court often must decide whether the defendant is the “foreign state” itself, or an “agency or instrumentality” of the foreign state. To make this determination, courts apply the so-called “core functions test.” Under this test, if the entity’s predominant activities, or “core functions,” are “governmental” in nature, courts will treat the entity as if it were the state itself, applying rules and standards more protective of the sovereign. However, if the entity’s “core functions” are predominantly “commercial” in character, courts will apply the less protective rules and standards reserved for agencies and instrumentalities of the state.

In 2009, in *Figueiredo v. Republic of Peru*, the United States District Court for the Southern District of New York applied the “core functions” test to determine whether a Brazilian corporation could enforce a Peruvian arbitral award against the Republic of Peru, the Ministry of Housing, Construction and Sanitation of the Republic, and the Programa Agua Para Todos (together “the Program”).⁵³ Applying the “core functions” test, the court held that the Program was a political organ or subdivision of the Republic, because it performed a governmental, rather than a commercial, function.⁵⁴ Specifically, the Republic created and funded the Program as a public entity in the Executive Branch to implement a national drinking water and sanitation program and to coordinate and manage various sanitation infrastructure programs.⁵⁵ Thus, because of its “quintessential governmental functions,” the Program was held to be a political organ of the state, and its signature to the arbitration agreement was binding on the Peruvian Government. Accordingly, the Program was not entitled to immunity.⁵⁶

III. Exceptions to the General Grant of Immunity

The FSIA provides for seven exceptions to the general grant of immunity. The 2009 decisions addressing those exceptions are discussed below.

⁵² See, e.g., 28 U.S.C. §§ 1608(a) & (b) (service of process); *id.* § 1391(f)(3) (permitting venue in suits against an agency or instrumentality of a foreign state “in any judicial district in which the agency or instrumentality is licensed to do business or is doing business); *id.* §§ 1610(a) & (b) (attachment of assets).

⁵³ *Figueiredo v. Republic of Peru*, 655 F. Supp. 2d 361, 370 (S.D.N.Y. 2009).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

A. Waiver – § 1605(a)(1)

Section 1605(a)(1) provides that a foreign sovereign does not enjoy immunity from suit in any case:

in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver.⁵⁷

In 2009, courts addressed both explicit and implicit waivers of sovereign immunity.

1. Explicit Waiver

In *Capital Ventures International v. Republic of Argentina*, the Second Circuit held that Argentina explicitly waived immunity where it stated in a contract that it waived “any immunity (sovereign or otherwise) from jurisdiction of any court”⁵⁸ The court held that no reference to the United States was required in the waiver clause and that “a waiver of sovereign immunity can be explicit even when other provisions of the document are applicable only to specific, non-United States jurisdictions.”⁵⁹

2. Implicit Waiver

Courts have found implied waivers in a variety of circumstances, including: (1) where a foreign state has agreed to arbitration in another country; (2) the foreign state has agreed that the law of a particular country should govern the contract; or (3) the foreign state has filed a responsive pleading without raising the defense of sovereign immunity.⁶⁰ This list is, however, not exclusive and courts generally look to whether “a direct connection between the sovereign’s activities in United States courts and plaintiff’s claims for relief exists.”⁶¹

Agreement to Participate in ADR. In *Odfjell Seachem A/S v. Continental De Petrols Et Investment SA*, the United States District Court for the Southern District of New York found that the defendant’s submission of a demand for arbitration of the dispute and agreement to enforce the judgment was “wholly inconsistent with any assertion of FSIA immunity” from attachment of assets.⁶²

⁵⁷ 28 U.S.C. § 1605(a)(1).

⁵⁸ 552 F.3d 289, 293-94 (2d Cir. 2009).

⁵⁹ *Id.* at 294-95, 296.

⁶⁰ *A.R. Int’l*, 634 F. Supp. 2d at 1115 (citing *Gates v. Victor Fine Foods*, 54 F.3d 1457 (9th Cir. 1995)); *see also Inversora Murten, S.A. v. Energoprojekt Holding Co.*, 671 F. Supp. 2d 152-55 (D.D.C. 2009) (citing *World Wide Minerals, Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1161 n.11 (D.C. Cir. 2002)).

⁶¹ *A.R. Int’l*, 634 F. Supp. 2d at 1115 (citing *In re Estate of Marcos Human Rights Litig.*, 94 F.3d 539, 546 (9th Cir. 1996)).

⁶² 613 F. Supp. 2d 497, 501 (S.D.N.Y. 2009).

On the other hand, in *A.R. International Anti-Fraud Systems, Inc.*, the United States District Court for the Eastern District of California found that an agreement to participate in that court's voluntary dispute resolution program did not equate to an agreement to arbitrate the dispute.⁶³ The court reasoned that, unlike arbitration, the evaluation of the case under the program "is not a judgment of the court, is made without prejudice and is non-binding."⁶⁴ In addition, the court found pertinent a letter in which the defendant's representative made clear that participation in the program was *not* a waiver of immunity.

Choice of U.S. Law. In *Ghawanmeh v. Islamic Saudi Academy*, the United States District Court for the District of Columbia held that the Islamic Saudi Academy had implicitly waived immunity by agreeing to resolve all contract disputes under Virginia law.⁶⁵

Responding to Discovery. Finally, in *Inversora Murten, S.A. v. Energoprojekt Holding Co.*, the United States District Court for the District of Columbia found that, where the defendant consistently had asserted immunity, it did not implicitly waive immunity simply by responding to a discovery request.⁶⁶ According to the court, discovery responses do not constitute responsive pleadings and therefore are insufficient to establish a waiver.⁶⁷

B. Commercial Activity – § 1605(A)(2)

With the ongoing globalization of business and the increased involvement of governments in commercial affairs, the "commercial activity" exception of the FSIA continues to be "the most significant of the FSIA's exceptions" invoked as a basis for U.S. courts to exercise jurisdiction over foreign sovereigns.⁶⁸ This exception to foreign sovereign immunity provides that a foreign state shall not be immune from the jurisdiction of U.S. courts in any case:

in which the action is based [(1)] upon a commercial activity carried on in the United States by the foreign state; or [(2)] upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or [(3)] upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States⁶⁹

⁶³ 634 F. Supp. 2d at 1116.

⁶⁴ *Id.*

⁶⁵ 672 F. Supp. 2d 3, 9-10 (D.D.C. 2009).

⁶⁶ 671 F. Supp. 2d 152, 156 (D.D.C. 2009).

⁶⁷ *Id.*

⁶⁸ See *Swarna*, 609 F. Supp. 2d at 523 (quoting *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 611 (1992)); *Energy Allied Int'l Corp. v. Petroleum Oil & Gas Corp. of South Africa*, No. H-08-2387, 2009 WL 2923035, at *2 (S.D. Tex. Sept. 4, 2009).

⁶⁹ 28 U.S.C. § 1605(a)(2).

In 2009, the courts applied the commercial activity exception conservatively, often declining to exercise jurisdiction in close cases. Courts upheld the immunity of states and their agents in cases ranging from private military services contracts, to a diplomat's hiring of domestic servants, to a charitable public entity's charging of fees for its services.

1. What Acts Are Considered Commercial?

In distinguishing between commercial and sovereign acts, the FSIA expressly requires that acts be defined by their nature, not their purpose.⁷⁰ For example, the act of hiring a real estate broker to locate and secure a building may be commercial in nature, and therefore fall within the exception, even if the broker was hired for the seemingly sovereign purpose of securing a Consulate building.⁷¹ In drawing the line between commercial and sovereign acts, courts in 2009 looked to the standard established by the Supreme Court in *Saudi Arabia v. Nelson*, which instructs that the commercial activity exception should apply “when a state exercises only those powers that can also be exercised by private citizens as distinct from those powers peculiar to sovereigns.”⁷²

Contracts for Military Services: Two military contract cases reported in Crowell & Moring's 2008 FSIA Year in Review met further scrutiny by the appellate courts in 2009. The outcomes of these cases highlight how nuanced differences between contracts can have major implications in terms of sovereign immunity.

In *Heroth v. Kingdom of Saudi Arabia*,⁷³ a group of U.S. contractor employees and their representatives brought suit against Saudi Arabia for failing to provide adequate security at a residential compound which was attacked by terrorists while the plaintiffs were living there. The plaintiffs argued that Saudi Arabia was subject to jurisdiction under the commercial activity exception to the FSIA because Saudi Arabia had contracted business with the plaintiffs' employer – a U.S. company. The United States Court of Appeals for the D.C. Circuit disagreed and affirmed the district court's holding that the Saudi Government's selection of a U.S. company to provide military training services under the U.S. Government's Foreign Military Sales (“FMS”) program was a sovereign, non-commercial act. The Court of Appeals cited its prior precedent that “[w]hen two governments deal directly with each other *as governments*, even when the subject matter may relate to the commercial activities of its citizens . . . those dealings are not akin to that of participants in the marketplace.”⁷⁴ Accordingly, the appellate court declined to extend the commercial activity exception to exercise jurisdiction over Saudi Arabia in the case. The Fifth Circuit addressed whether the provision of military training

⁷⁰ See 28 U.S.C. § 1603(d).

⁷¹ See *Box*, 2009 WL 3163551, at *2.

⁷² *RSM Prod. Corp. v. Fridman*, 643 F. Supp. 2d 382, 399 (S.D.N.Y. 2009) (quoting *Saudi Arabia v. Nelson*, 507 U.S. 349, 360 (1993)) (citations omitted); see also *O'Bryan*, 556 F.3d at 379 (discussing *Nelson*); *Westfield v. Fed. Republic of Germany*, No. 3:09-0204, 2009 WL 2356554, at *4 (M.D. Tenn. July 28, 2009) (citing *Nelson* test).

⁷³ 331 F. App'x 1 (D.D.C. 2009), *aff'g Heroth v. Kingdom of Saudi Arabia*, 565 F. Supp. 2d 59 (D.D.C. 2008).

⁷⁴ *Id.* at 3 (citing *Cicippo v. Islamic Republic of Iran*, 30 F.3d 164, 168 (D.C. Cir. 1994)).

services to a foreign military base would remain subject to the exception if it had been brokered *privately, i.e.*, outside of the FMS program.

*UNC Lear Services, Inc. v. Kingdom of Saudi Arabia*⁷⁵ is instructive in addressing that issue as it deals with a pair of non-FMS military contracts. There, the Saudi Government hired an American company for two contracts: (1) a maintenance contract to service and maintain its fleet of F-5 aircraft; and (2) a technical contract to provide training and support services to the Royal Saudi Air Force (“RSAF”). The district court had concluded that the contracts were sufficiently similar to be treated as part of the same transaction, and thus the commercial activity exception applied to both because Saudi Arabia had ventured into the marketplace to contract for these military maintenance and training services in the same manner as would a private party.

On appeal, the Fifth Circuit found that the two contracts were distinct and had to be considered separately. With respect to the maintenance contract, the court upheld jurisdiction over Saudi Arabia, finding that the Kingdom “entered the marketplace to obtain repair services . . . for its F-5 aircraft” and that the military purpose of the contract “does not take the transaction outside of the ‘commercial’ exception to sovereign immunity.”⁷⁶ The court, however, reached the opposite conclusion (and reversed the district court’s decision) with respect to the technical services contract. The appellate court found significant that contractors under the technical services contract were formally integrated into the RSAF to provide flight operations services and training. Thus, “[u]nlike a contract to buy army boots or bullets . . . [this] was a contract to provide personnel that were vital to the operation of a national air defense system.”⁷⁷ The court emphasized that the contract was sovereign in both its purpose *and* its nature: “The legislative history from the FSIA instructs [that] ‘the employment of diplomatic, civil service, or military personnel is not commercial in nature.’”⁷⁸ Because the court concluded that the employees under the technical contract were “integrated into the RSAF and [could] be considered military personnel,” it found that entering into the contract was a sovereign act and fell outside of the commercial activity exception of the FSIA.

Commercial Acts of Diplomats: A pair of cases in the District of Columbia and New York tested both diplomatic and sovereign immunity in 2009, as Kuwait and its diplomats defended multiple claims brought by domestic servants against their employers. Jurisdiction in both cases hinged on the question of whether the hiring and employment of domestic servants was a commercial activity, and whether the servants were employees of the sovereign itself, or of the individual diplomats.

⁷⁵ 581 F.3d 210 (5th Cir. 2009), *aff’g* No. SA 04-CA-1008, 2008 WL 2946059 (W.D. Tex. July 25, 2008).

⁷⁶ *Id.* at 217 (citing *McDonnell Douglas Corp. v. Islamic Republic of Iran*, 758 F.2d 341, 349 (8th Cir. 1985)).

⁷⁷ *Id.* at 216.

⁷⁸ *Id.* (citing H.R. REP. No. 94-1487, at 16 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6614; *Holden v. Canadian Consulate*, 92 F.3d 918, 921 (9th Cir. 1996)).

In *Swarna v. Al-Awadi*,⁷⁹ a live-in domestic servant for a Kuwaiti diplomat in New York City, brought suit against the diplomat in his individual capacity for subjecting her to “slavery-like practices” (including assault and sexual abuse) and violating labor laws. She also brought claims against Kuwait on the grounds that it both actively supported, and was vicariously liable for, the diplomat’s actions. The individual defendants did not respond to the complaint, and Kuwait moved to dismiss for lack of subject matter jurisdiction under the FSIA.

The United States District Court for the Southern District of New York granted the plaintiff summary judgment against her individual employers, but denied her claims against Kuwait itself.

The court first noted that a diplomat acting in his official capacity typically is considered akin to an “agency or instrumentality” of the state and is therefore protected under the FSIA.⁸⁰ In this case, however, the diplomat’s alleged actions – forced labor, rape and trafficking – were not “official” acts. They were private actions, beyond the scope of his official responsibilities and therefore *not* protected.⁸¹ Moreover, the plaintiff was a servant at the diplomat’s private home, and, thus the court found that her employment “bore no relationship to the functions of a diplomatic mission.”⁸² With respect to Kuwait, the court found a “critical” distinction between employment by the sovereign of civil service personnel and employment by diplomats themselves of domestic servants or laborers.⁸³ The court took note of the plaintiff’s allegations that Kuwait had paid for the individual defendants’ moving and living expenses, owned the home where they lived, and reimbursed them for certain expenses. Nevertheless, the court found that these allegations reflected conduct “peculiar to sovereigns” and were “insufficient to establish that Kuwait engaged in commercial activity.”⁸⁴ Thus, because the plaintiff “failed to establish that Kuwait’s actions,” as opposed to the actions of the individual defendants, “are the *type* of actions by which a private party engages in trade and traffic or commerce,” the exception did not apply.⁸⁵

In a similar suit against Kuwait, *Sabbithi v. Al Saleh*,⁸⁶ a group of domestic workers brought various labor law, trafficking, tort and breach of contract claims against their former employers – diplomats at the Kuwaiti Embassy in Washington, D.C. – as well as against Kuwait itself. All defendants moved to dismiss the claims. In this case, the United States District Court for the District of Columbia reached the opposite conclusion of the *Swarna* court with respect to the individual defendants, finding that “hiring domestic employees is an activity incidental to the

⁷⁹ 607 F. Supp. 2d 509 (S.D.N.Y. 2009).

⁸⁰ *Id.* at 522.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 524.

⁸⁴ *Id.* at 525.

⁸⁵ *Id.* (emphasis in original).

⁸⁶ 623 F. Supp. 2d 93 (D.D.C. 2009).

daily life of a diplomat and his or her family and does not constitute commercial activity outside a diplomat's official function."⁸⁷ Because the plaintiffs failed to serve Kuwait properly under § 1608 of the FSIA, the court did not address whether Kuwait was entitled to immunity.⁸⁸

Public Charitable Activity: One court addressed whether a government-sponsored charity falls within the commercial activity exception. In *Dabiri v. Federation of States Medical Boards of the United States, Inc.*, the plaintiff, Dr. Dabiri, brought suit against the General Medical Council ("GMC"), a statutory entity created by the British Parliament and registered as a charity in England, whose functions include keeping up-to-date registers of qualified doctors, fostering good medical practice, and addressing concerns about doctors whose fitness to practice medicine is in doubt.⁸⁹ Dr. Dabiri claimed that GMC improperly released information about his fitness to practice medicine to U.S. entities, which, he claimed, prevented him from securing a job or medical license in the United States. Dr. Dabiri argued that GMC engaged in commercial activities in the United Kingdom by educating the general public about health issues, keeping registers of doctors, and charging fees for its services. The United States District Court for the Eastern District of New York found Dr. Dabiri's allegations insufficient to support a finding of commercial activity given that GMC is a public authority and a charitable organization.⁹⁰

Licensing Natural Resources: Courts have long held that *licensing or authorizing* the exploitation of natural resources is a sovereign activity.⁹¹ In 2009, in *RSM Product Corp. v. Fridman*, the United States District Court for the Southern District of New York likewise held that Grenada was immune from suit for allegedly breaching a contract by denying a company a license to conduct oil and gas exploration off its country's coast.⁹² The court held that "while Grenada may have spoken in commercial terms when it allegedly breached the Agreement, this does not warrant application of the FSIA's commercial activity exception, as the Agreement was one that only a sovereign could have made."⁹³

Government Takings of Private Property:⁹⁴ Is it commercial activity when a government takes an individual's property and privately auctions it off for profit? This question was addressed by the United States District Court for the Middle District of Tennessee in *Westfield v.*

⁸⁷ *Id.* at 96.

⁸⁸ For further discussion of service under 28 U.S.C. § 1608, *see* Section V.A, *infra*.

⁸⁹ No. 08-cv-4718, 2009 WL 803126 (E.D.N.Y. Mar. 25, 2009).

⁹⁰ *Id.* at *3.

⁹¹ *See, e.g., RSM Prod. Corp v. Fridman*, 643 F. Supp. 2d. 382, 399 (S.D.N.Y. 2009) (citing *MOL, Inc. v. Peoples Republic of Bangladesh*, 736 F.2d 1326, 1328 (9th Cir. 1984)) (emphasis added)).

⁹² *See id.*

⁹³ *Id.* (citations omitted).

⁹⁴ Note: This section deals with the question whether government takings are *commercial activities* under § 1605(a)(2) of the FSIA. For discussion of the "takings" exception to the FSIA, § 1605(a)(3), *see* Section III (C), *infra*.

Republic of Germany.⁹⁵ In that case, the estate of Walter Westfield brought suit against Germany, alleging that the former Nazi regime arrested Mr. Westfield, seized his vast art collection and sold it on the private market to raise funds for the German Government – a practice common during the Nazi era. Because the German Government took the art for the purpose of selling it on the private art market, the plaintiff alleged that the government’s acts were “in connection with” commercial activity abroad and that they had a “direct effect in the United States” because the artwork was intended for immediate transfer to the United States by Westfield (through it did not reach the United States) and Westfield’s relatives in the U.S. were deprived of his property. The court refused to exercise jurisdiction, finding that the case turned on how the property was *obtained*, rather than how the government intended to dispose of it. Thus, because the case was “based upon” an act that could be taken only by a sovereign – *i.e.*, either an expropriation or satisfaction of a criminal penalty in connection with Mr. Westfield’s prosecution – the exception did not apply.⁹⁶ Because the court found that no commercial activity took place, it did not consider whether the deprivation of property to Westfield’s U.S. relatives constituted a “direct effect” in the United States.

2. What Acts Create a Sufficient Nexus with the United States?

Once an act has been deemed “commercial” under the FSIA, it still must have a sufficient jurisdictional nexus with the United States to fall within the commercial activity exception. A nexus can be established in three ways: (1) the foreign sovereign conducts a commercial act in the U.S.; (2) the sovereign conducts an act in the United States in connection with commercial activity abroad; or (3) the sovereign acts *outside* of the U.S. in connection with the state’s commercial activity but causes a “direct effect” in the United States.⁹⁷

Acts in the U.S. by foreign states. The first clause of the exception permits jurisdiction over commercial acts carried out in the United States by foreign states. Because “a sovereign [state] cannot act except through individuals,”⁹⁸ whether the exception applies on this basis often depends on whether the sovereign can be bound by the acts of its agents in the U.S. In general, courts have responded that “the commercial activity exception may be invoked against a foreign state *only* when its officials have actual authority.”⁹⁹

⁹⁵ No. 3:0900204, 2009 WL 2356554 (M.D. Tenn. July 28, 2009).

⁹⁶ See *Edem v. Ethiopian Airlines Enter.*, No. 08-cv-2597, 2009 WL 4639393 (E.D.N.Y. Sept. 30, 2009) (holding that an Ethiopian customs officer’s alleged seizure of \$13,600 of cash was particularly sovereign in nature).

⁹⁷ 28 U.S.C. § 1605(a)(2).

⁹⁸ *Swarna*, 607 F. Supp. 2d at 518 (quoting *In re Terrorist Attacks on September 11, 2001*, 538 F.3d 71, 84 (2d Cir. 2008) (internal quotations omitted)).

⁹⁹ See *Allfreight Worldwide Cargo, Inc. v. Ethiopian Airlines Enter.*, 307 F. App’x. 721, 724 (4th Cir. 2009) (noting that the Fourth Circuit joined the Ninth and Fifth Circuits in holding that only actual – as opposed to apparent – authority will suffice to trigger the commercial activity exception to the FSIA).

The recent decision by the United States Court of Appeals for the Fourth Circuit in *Allfreight Worldwide Cargo, Inc. v. Ethiopian Airlines Enterprise*¹⁰⁰ raises important considerations regarding this issue for parties transacting business with foreign government agents in the United States. In that case, Allfreight brought a breach of contract action against the sovereign-owned Ethiopian Airlines (“EAE”). The contract in question had not been officially approved by EAE’s general counsel (as required by EAE’s policy), but had been signed on EAE’s behalf by two company officials who had produced a “Delegation of Authority,” written on EAE letterhead, authorizing them to enter into the contract. Although Allfreight knew nothing about the EAE’s policy regarding contract approval, the Fourth Circuit agreed with EAE that the contract was void and unenforceable. Specifically, the court held that parties transacting with foreign sovereign agents have a strict affirmative duty to make sure that the agents have actual authority to bind the sovereign.¹⁰¹ Thus, despite what may have been an honest mistake, the contract was deemed void, and no exception to immunity applied.

Another question that has arisen under this clause of the commercial activity exception is whether the acts in the United States are sufficiently related to the claims to “form the basis of the suit.” In *Alperin v. Vatican Bank*,¹⁰² a group of Holocaust survivors brought suit against the Vatican Bank to recover property and profits that the Nazis had obtained through genocidal acts, looting and slave labor, and that were allegedly deposited in the Vatican Bank. The plaintiffs argued that jurisdiction was proper over the Vatican Bank (a foreign sovereign entity) because another defendant allegedly had used funds laundered by the Vatican Bank to establish publishing houses and other commercial activities in the United States. Additionally, plaintiffs alleged that the Vatican Bank had been able to store gold in the United States and trade it on U.S. stock exchanges because their gold collection had been so enhanced by the stolen property. The court held that these alleged commercial activities in the United States were “too tangentially related to [the plaintiffs’] legal claims to be considered ‘the basis for [the] suit.’”¹⁰³

Acts in the U.S. in connection with commercial activity abroad. The second clause of the commercial activity exception provides for jurisdiction where the foreign sovereign performs acts in the United States in connection with a commercial activity abroad. As with the first clause of the commercial activity exception, for the exception to apply, the act in the United States must be not only “in connection with” the commercial activity of the foreign state, but also must be sufficient to form the basis of the suit itself. In other words, if the foreign state’s acts in the United States are unrelated to the cause of action, such acts cannot confer jurisdiction under the exception.¹⁰⁴

¹⁰⁰ *Id.* at 721.

¹⁰¹ *Id.* at 724.

¹⁰² 360 F. App’x. 847 (9th Cir. 2009).

¹⁰³ *Id.* at 850. The court further held that the “cumulative impact of [the plaintiffs’ gold] on [the Bank’s] holdings and on its commercial activities in the United States over a decade later; and the results of another party allegedly investing laundered funds in Chicago” were insufficiently “direct” to confer jurisdiction. *Id.* (citation omitted).

¹⁰⁴ See *Heroth*, 331 F. App’x. at 1 (finding defendant’s actions of recruiting employees in U.S. insufficient to form basis of “failure to warn” cause of action because actual failure to warn occurred outside U.S.).

Acts outside the U.S. that cause a “direct effect” in the U.S. The third clause of the commercial activities exception grants U.S. courts jurisdiction over acts that occur *outside* the United States commercial acts, but which cause a “direct effect” *in* the United States. Because Congress provided no guidance as to what constitutes a “direct effect” in the United States, this clause tends to generate substantial litigation particularly regarding how strong the “direct effect” must be to bring an act within the exception. This remained true in 2009 when courts continued to struggle to establish clearly-defined boundaries under this prong. Still, the decisions in 2009 provide some useful guidance looking forward.

- Financial Hardship or Loss Felt in the United States: Direct Effect?: Courts historically have viewed with skepticism the argument that the mere financial loss to an American citizen or company constitutes a “direct effect” sufficient to confer jurisdiction over a foreign sovereign. In 2009, the courts generally upheld this principle. For example, in *Pons v. People’s Republic of China*,¹⁰⁵ the United States District Court for the Southern District of New York considered whether there is a “direct effect” in the United States when a sovereign defendant defaults on a bond negotiated, consummated and payable outside of the United States, causing financial injury to U.S. after-market bond purchasers. The court held that there was no jurisdiction over the sovereign defendant,¹⁰⁶ noting that the bonds called for payment in any of five locations, all *outside* of the U.S. The court also rejected the argument that the *voluntary* tender of interest payments in the U.S. created a “direct effect,” finding that the relevant place of performance is where such performance can be *demand*ed, not where it is voluntarily made.¹⁰⁷ The court concluded that “Congress did not intend to provide jurisdiction whenever the ripples caused by an overseas transaction manage eventually to reach the shores of the United States.”¹⁰⁸

In *Energy Allied International Corp. v. PetroSA*,¹⁰⁹ the United States District Court for the Southern District of Texas similarly held that financial hardship suffered in the U.S. was an insufficient “direct effect.” In that case, a U.S. corporation entered into a joint venture with a South African government entity, PetroSA, to exploit certain oil concessions in Egypt. After the companies jointly submitted the winning bid to the Egyptian authorities, PetroSA’s board decided not to invest in the project, allegedly leaving the U.S. corporation in the lurch, with a damaged reputation, no time to find a new partner and a lost business opportunity. The court did not find any of these alleged harmful effects to be a “direct effect” in the United States. Specifically, with respect to the plaintiff’s claim that the lost potential business opportunity directly caused the U.S. company to experience financial harm, the court noted that financial

¹⁰⁵ 666 F. Supp. 2d 406 (S.D.N.Y. 2009).

¹⁰⁶ *Id.* at 413.

¹⁰⁷ The court also discouraged parties from resting too heavily on the U.S.’s role as an international financial center to establish jurisdiction, stating that, “[t]hrough the United States enjoys the status of being a world financial center, the FSIA was not meant to make its courts as open as its markets.” *Id.* at 413.

¹⁰⁸ *Id.* at 412 (citing *United World Trade, Inc. v. Mangyshlakneft Oil Prod. Ass’n*, 33 F.3d 1232, 1238 (10th Cir. 1994); *Virtual Countries v. Republic of South Africa*, 300 F.3d 230, 236-237 (2d Cir. 2002)).

¹⁰⁹ No. H-08-2387, 2009 WL 2923035 (S.D. Tex. Sept. 4, 2009).

hardship “is too vague a basis for a direct effect,” and noted that “the focus of extant jurisprudence has been on the breach of *performance* due in the United States.”¹¹⁰

While most courts have accepted the principle that financial or business losses alone are insufficient to create a “direct effect” under the FSIA, the limits of this rule are still being tested. This was demonstrated in early 2010, when the United States Court of Appeals for the District of Columbia Circuit overturned a 2009 district court decision, which had upheld sovereign immunity where plaintiff had alleged that the sovereign’s conduct caused financial harm to the U.S. parties. In *Cruise Connections Charter Management*,¹¹¹ a North Carolina company sued certain Canadian government agencies for breach of contract, relating to boat charter services for the 2010 Olympic Games in Vancouver. Pursuant to the contract with Canada, Cruise Connections was required to subcontract with two U.S. boat operators to use their vessels. Yet, before any of those contracts could be performed, Canada allegedly altered the terms of the arrangement, causing the U.S. companies to back out, which, in turn, led to the termination of the underlying contract. Although the contract with Canada was executed, was to be performed, and was allegedly breached in Canada, the plaintiffs asserted jurisdiction in the U.S. based on the commercial activity exception because (1) Canada’s actions caused Cruise Connections, and third-party U.S. boat operators with whom it had contracted, to lose U.S. business; and (2) the contract allegedly required the Canadian entities to pay Cruise Connections via wire transfer to a U.S. bank and therefore caused a “direct effect in the United States.”

The district court rejected the first argument, adhering to the longstanding rule that “mere financial loss by an American individual or company does not constitute a ‘direct effect’ in the United States,”¹¹² and finding that Cruise Connection’s inability to perform its contractual obligations to the third parties constituted an intervening element between Canada’s breach and the broken third-party agreements. The court also rejected Cruise Connection’s second argument, finding no evidence that payment was *required* in the United States.

On appeal, the United States Court of Appeals, reversed, finding that Canada’s termination of the contract had a direct effect in the United States because, as a result of Canada’s acts, “the U.S. company [was] unable to consummate fully negotiated, multi-million-dollar subcontracts with U.S.-based cruise lines to provide the necessary ships.”¹¹³ Thus, because “the alleged breach resulted in the direct loss of millions of dollars worth of business in the United States,”¹¹⁴ the appellate court found a direct effect in the United States sufficient to confer jurisdiction.

¹¹⁰ *Id.* at *4 (emphasis added).

¹¹¹ *Cruise Connections Charter Mgmt., LLP v. Attorney Gen. of Canada*, 634 F. Supp. 2d 86 (D.D.C. 2009), *rev’d*, 600 F.3d 661 (D.C. Cir. 2010).

¹¹² *Id.* at 88.

¹¹³ *Cruise Connections Charter Management, LLP*, 600 F.3d 661, 662.

¹¹⁴ *Id.* at 666.

• Nonpayment to a U.S. Bank Account: Many plaintiffs have argued that the failure to make payment in the United States under a contract causes a “direct effect” in the United States sufficient to confer jurisdiction under the FSIA, even where all other relevant acts took place abroad. Courts have required in such cases that the plaintiff make a strong showing that the U.S. was the required or intended place of payment (not merely an available option). In the lower court’s decision in *Cruise Connections*,¹¹⁵ the district court helped to clarify this standard, identifying four scenarios set out in the case law where payment (or nonpayment) through U.S. bank accounts constitutes a direct effect in the United States:

- (1) the contract expressly designates an American location as the place of payment;
- (2) the contract allows the payee to designate a place of payment, and an American location is designated;
- (3) the contract is silent on payment location, but the payee asks and the payer agrees to pay at an American location;¹¹⁶ and
- (4) the contract is silent on payment location, but there is a longstanding consistent customary practice between the parties of payment at an American location.¹¹⁷

The court also provided additional guidance regarding how “express” the designation of a U.S. payment location must be before it is deemed sufficient to support jurisdiction against the sovereign.¹¹⁸ Specifically, the court rejected the plaintiff’s argument that the mere fact that the contract required the Canadian entities to pay the U.S.-located charter company by “direct payment” was sufficient to demonstrate a “direct effect” in the U.S. Nor was it sufficient to allege simply that the payee had selected to establish a U.S. bank account to receive payment. Rather, the court held that, for the exception to apply, the parties must have agreed, expressly or impliedly, that payment would occur in the United States.¹¹⁹

• Payment from a U.S. Bank Account: In *Guirlando v. T.C. Ziraat Bankasi, A.S.*,¹²⁰ the United States District Court for the Southern District of New York addressed the flip-side question, *i.e.*, whether the failure to make a payment *from* a U.S. bank account creates a direct effect in the U.S. The court held that such a failure is not enough to confer jurisdiction. Rather,

¹¹⁵ 634 F. Supp. 2d 86, 88 (D.D.C. 2009).

¹¹⁶ *Id.* (citing *I.T. Consultants, Inc. v. Islamic Republic of Pakistan*, 351 F.3d 1184 (D.C. Cir. 2003)).

¹¹⁷ *Id.* at 88 (citing *Goodman Holdings v. Rafidain Bank*, 26 F.3d 1143 (D.C. Cir. 1994) (Wald, J., concurring)).

¹¹⁸ *Id.* at 88-89.

¹¹⁹ *Id.*

¹²⁰ No. 07 Civ. 10266, 2009 WL 159705 (S.D.N.Y. Jan. 7, 2009), *denying reconsideration of Guirlando v. T.C. Ziraat Bankasi, A.S.*, No. 07 Civ. 10266, 2008 WL 5272195 (S.D.N.Y. Dec. 15, 2008).

the court applied a “legally significant act” test, pursuant to which the plaintiff must demonstrate a legally significant act in the U.S., *e.g.*, a requirement that moneys be deposited in the U.S. or that credit documents be presented in the U.S. In short, the court held that the fact that money was withdrawn from a U.S. account, as opposed to a bank located elsewhere, was entirely fortuitous, and insufficient to subject a foreign sovereign to U.S. jurisdiction.¹²¹

C. Takings – § 1605(a)(3)

In 2009, the Ninth Circuit in *Cassirer v. Kingdom of Spain* issued a significant decision addressing the FSIA’s “takings exception” that provides important guidance for parties hoping to invoke this exception in the future.¹²² The takings exception permits jurisdiction over a foreign state in any case:

in which rights in property taken in violation of international law are in issue and [either (1)] that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or [(2)] that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.¹²³

Scope of the Exception. In *Cassirer*, the plaintiff brought suit against the Kingdom of Spain and the Thyssen-Bornemisza Collection Foundation to recover a painting located in the Foundation’s museum in Madrid.¹²⁴ The plaintiff alleged that the painting originally had belonged to his grandmother, but the Nazis took it from her in 1939 in violation of international law.¹²⁵ Through the years, the painting was bought and sold several times, until it finally became part of the Foundation’s collection, under Spain’s ownership.¹²⁶

¹²¹ See also *Antares Aircraft, L.P. v. Fed. Republic of Nigeria*, 999 F.2d 33, 36 (2d Cir. 1993). There, the plaintiff sued for damages relating to the detention, damage and conversion of its aircraft – all of which happened in Nigeria. The plaintiff argued that it paid certain fees related to this action to the defendants from its bank account in New York, thus creating a direct effect in the U.S. for FSIA purposes. The Second Circuit disagreed, finding that this fact was “without legal significance.”

¹²² *Cassirer v. Kingdom of Spain*, 580 F.3d 1048, 1058 (9th Cir. 2009).

¹²³ 28 U.S.C. § 1605(a)(3). See also *Edem v. Ethiopian Airlines Enter.*, No. 08-cv-2597, 2009 WL 4639393 at *2 (E.D.N.Y. Sep. 30, 2009) (outlining four elements necessary to satisfy the takings exception: “(1) that rights in property are at issue; (2) that the property was taken; (3) that the taking was in violation of international law; and either (4)(a) that property . . . is present in the United States in connection with a commercial activity carried on in the United States by the foreign state, or (4)(b) that property . . . is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.”)

¹²⁴ *Id.* at 1051.

¹²⁵ *Id.*

¹²⁶ *Id.* at 1052-54.

The Ninth Circuit first addressed the question whether the takings exception applies where the defendant was not the original sovereign entity that expropriated the property. Both parties agreed that it was Germany, not Spain, that originally had taken the painting from the plaintiff's grandmother.¹²⁷ However, the defendants argued that the court should read into the exception a requirement that only the expropriating state can lose its immunity from suit. The court rejected the defendants' argument. Specifically, the court focused on the statute's use of the passive voice in providing an exception to immunity for any case "in which rights in property *taken* in violation of international law are in issue."¹²⁸ The court found the language to be unambiguous in allowing claims against foreign states that did not themselves expropriate the property.¹²⁹

More "Commercial Activity" Analysis. Like the FSIA's "commercial activity" exception, the takings exception requires a commercial nexus between the United States and either the property at issue in the claim or the foreign state actor itself.¹³⁰ As discussed more fully in the discussion of the commercial activity exception *supra*, the FSIA defines a commercial activity as "either a regular course of commercial conduct or a particular commercial transaction or act."¹³¹ Other courts have put it this way: "To determine whether a given activity was commercial . . . [t]he central question is whether the activity is of a kind in which a private party might engage."¹³²

In *Cassirer*, the Ninth Circuit held that the Foundation had engaged in commercial activity in the U.S. "of a kind in which a private party might engage."¹³³ Specifically, the court found that the Foundation had, *inter alia*, made numerous purchases of books, posters, post cards, and related materials from businesses in the U.S., sold posters and books to U.S. residents and businesses, and shipped items to purchasers in the U.S. The Foundation even sold a poster of the painting at issue in the case to individuals in the U.S. and, purchased books about Nazi expropriation from Amazon.com and the American Association of Museums in Washington, D.C.¹³⁴ Based on this evidence, the court held that the defendants had engaged in commercial activity in the U.S. sufficient to satisfy § 1605(a)(3).¹³⁵

Exhaustion. One final twist in the *Cassirer* decision relates to the defendants' argument that the plaintiff was required to exhaust local remedies before it could pursue an action under

¹²⁷ *Cassirer*, 580 F.3d at 1056.

¹²⁸ *Id.* (quoting 28 U.S.C. § 1605(a)(3)) (emphasis added).

¹²⁹ *Id.* In 2010, a majority of the *en banc* panel of the Ninth Circuit agreed with this holding. *Cassirer v. Kingdom of Spain*, -- F.3d --, 2010 WL 3169570 (9th Cir. Aug. 12, 2010).

¹³⁰ 28 U.S.C. § 1605(a)(3).

¹³¹ *Cassirer*, 580 F.3d at 1058 (citing 28 U.S.C. § 1603(d)).

¹³² *Id.* (citing *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 708 (9th Cir. 1992)).

¹³³ *Id.* at 1059 (citing *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 708 (9th Cir. 1992)).

¹³⁴ *Id.* at 1058.

¹³⁵ *Id.* The 2010 *en banc* majority agreed with this holding as well. See *Cassirer*, 2010 WL 3169570, at *9-11

the FSIA. The district court had held that the plain language of the FSIA contains no such requirement and refused to impose one in the case. The three-judge panel of the Ninth Circuit recognized that the FSIA contains no express exhaustion requirement, but remanded for the district court to determine whether a “prudential” exhaustion requirement was warranted in the case.¹³⁶ But, in 2010, a majority of the *en banc* panel of the Ninth Circuit ended the debate (for the time being), agreeing with the district court that no statutory exhaustion requirement exists under the FSIA and finding that any “prudential” arguments for exhaustion were not before the court and therefore were outside the appellate court’s “present jurisdiction.”¹³⁷

D. Non-Commercial Torts – § 1605(a)(5)

The “non-commercial tort” or “tortious activity” exception removes a sovereign defendant’s immunity:

for acts (1) occurring in the United States; (2) caused by [a] tortious act or omission; (3) where the alleged acts or omissions were those of a foreign state or of any official or employee of that foreign state; where (4) those acts or omissions were done within the scope of tortfeasor’s employment.¹³⁸

When analyzing these elements, courts generally apply the substantive law of the state in which the act took place.¹³⁹

The Act, however, sets forth two statutory carve-outs to the exception. First, the exception does not apply where the claim is based on the exercise or performance of (or failure to perform) a “discretionary function.”¹⁴⁰ Second, the exception does not apply to claims arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit or interference with contractual rights.¹⁴¹

¹³⁶ *Cassirer*, 580 F.3d at 1059-64.

¹³⁷ *Cassirer*, 2010 WL 3169570, at *13-14.

¹³⁸ *O’Bryan*, 556 F.3d at 380-81 (citing 28 U.S.C. § 1605(a)(5)) (internal quotations omitted).

¹³⁹ *Id.* at 381 (applying Kentucky law to the four elements of the tortious act exception). *See also Doe v. Holy See*, 557 F.3d 1066, 1083 (9th Cir. 2009) (applying Oregon law to determine whether the tortfeasor’s actions were “within the scope of employment”), Supreme Court has invited the Solicitor General to file a brief expressing the views of the United States in *Holy See v. Doe*, No. 09-1, 130 S. Ct. 659, 2009 WL 3805755 (Nov. 16, 2009); *Swarna*, 607 F. Supp. 2d 509, 525 (applying New York law to determine whether the tortfeasor’s actions were “within the scope of employment”).

¹⁴⁰ 28 U.S.C. § 1605(a)(5)(A).

¹⁴¹ *Id.* § 1605(a)(5)(B).

In 2009, there were two developments relating to the non-commercial torts exception: First, the Ninth Circuit addressed the scope of the discretionary function exception.¹⁴² Second, Congress proposed a bill to amend §1605(a)(5) to encompass terrorist activity.

Scope of the Discretionary Function Exception. A foreign sovereign is immune from suit if it can successfully establish that the tort claims are “based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused.”¹⁴³ Courts have held that a foreign sovereign retains its immunity if the challenged action is: (1) “discretionary in nature or involve[s] an element of judgment and choice and (2) the judgment is of the kind that the discretionary function exception was designed to shield” – that is, “whether the choice or judgment was one involving social, economic or political policy.”¹⁴⁴

In *Doe v. Holy See*, the Ninth Circuit addressed whether the tortious activity exception should be applied to claims for negligent retention, supervision, and failure to warn against the Holy See by the alleged victims of sexual abuse by Roman Catholic priests.¹⁴⁵ The court held that the actions at issue were discretionary functions and thus, the Holy See retained its foreign sovereign immunity.¹⁴⁶ The Court noted that the key question is not whether the sovereign’s actions were “grounded in policy considerations,” but rather whether a foreign state’s decision is “susceptible to a policy analysis,” *i.e.* “one that implements political, social and economic judgments.”¹⁴⁷ Ultimately, because “social, economic, or political policy considerations” could have influenced the Holy See’s decisions,¹⁴⁸ the court held that the Holy See’s decision was “the kind of judgment that the discretionary function exception was designed to shield.”¹⁴⁹

Proposed Amendment Encompassing Terrorism. In 2009, Senator Specter proposed the Justice Against Sponsors of Terrorism Act,¹⁵⁰ a law which would allow victims of terrorism to sue foreign states for damages resulting from attacks on U.S. soil. Unlike the state sponsorship of terrorism, the defendant sovereign need not be on the U.S. Department of State’s state sponsor of terrorism list. Rather any country that provides material support for a terrorist attack on U.S. soil would be stripped of immunity and subject to jurisdiction in U.S. courts.

¹⁴² *O’Bryan*, 556 F.3d 361; *Doe*, 557 F.3d 1066; *Swarna*, 607 F. Supp. 2d 509; *Swarna v. Al-Awadi*, No. 06 Civ. 4880 (PKC), 2009 WL 1562811 (S.D.N.Y. May 29, 2009).

¹⁴³ *Doe*, 557 F.3d at 1083.

¹⁴⁴ *Id.* at 1083-84 (citing *United States v. Gaubert*, 499 U.S. 315, 322 (1991)); *O’Bryan*, 556 F.3d at 384.

¹⁴⁵ *Doe*, 557 F.3d at 1069.

¹⁴⁶ *Id.* at 1083-85. The court found that the Holy See could still be liable for *Doe’s respondeat superior* claim. *Id.*

¹⁴⁷ *Id.* (citing *Kelly v. United States*, 241 F.3d 755, 764 n.5 (9th Cir. 2001)).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ S. 2930, 111th Cong. (2009).

The Act purports to overturn the Second Circuit’s decision in *In re Terrorist Attacks on September 11, 2001*,¹⁵¹ in which the court dismissed claims by victims of the September 11, 2001, attacks that alleged that the Saudi Arabian Government played a role in the attacks on the World Trade Center and Pentagon.¹⁵² The court rejected plaintiffs’ argument that the claims fell squarely within the commercial tort exception, holding that the state sponsorship of terrorism was the exclusive means of asserting a claim against a foreign state for material support of a terrorist act. Because Saudi Arabia has never been designated as a state sponsor of terrorism, the Court held that it is immune from suit alleging terrorist-related acts.¹⁵³

The proposed Justice Against Sponsors of Terrorism Act sponsored by Senator Arlen Specter, declares that the Second Circuit’s decision “undermine[s] important counter-terrorism policies of the United States, by affording undue protection from civil liability to persons, entities and states that provide material support or resources to foreign terrorist organizations, and by depriving victims of international terrorism of meaningful access to court to seek redress for their injuries.”¹⁵⁴ As Senator Specter explained, “[t]he Act’s main provisions would amend the FSIA to make clear that, as Congress originally intended, a foreign state may be sued under the torts exception if it sponsors terrorists who commit terrorist attacks on our soil, without regard to whether it is a state-designated sponsor of terrorism”¹⁵⁵

Specifically, the Act would amend § 1605(a)(5) to apply “regardless of where the underlying tortious act or omission is committed, and to include without limitation any tort claim in relation to an act of extrajudicial killing, aircraft sabotage, hostage taking, terrorism, or the provision of material support or resources (as defined in section 2339A of title 18) for such an act.”¹⁵⁶ The Act would apply retroactively, such that pending actions relying on § 1605(a)(5) would benefit from the amendment upon motion, and that claims dismissed on the grounds that the exception did not apply to terrorism would be reinstated.¹⁵⁷

E. Arbitration – § 1605(a)(6)

United States courts have jurisdiction under the FSIA to enforce an agreement to arbitrate or to confirm an award made pursuant to such an agreement in two cases: (1) where the arbitration took place or is intended to take place in the United States; or (2) where the agreement or award is governed by a treaty or other international agreement calling for the

¹⁵¹ 538 F.3d 71 (2d Cir. 2008), *cert. denied sub nom., Fed. Ins. Co. v. Kingdom of Saudi Arabia*, 129 S. Ct. 2859 (2009).

¹⁵² *Id.* at 90.

¹⁵³ *Id.* at 89.

¹⁵⁴ S. 2930 § 2(a)(7).

¹⁵⁵ 155 Cong. Rec. S13885 (daily ed. Dec. 23, 2009).

¹⁵⁶ S. 2930 § 3(a)(1)(B).

¹⁵⁷ S. 2930 § 3(b)-(d).

recognition and enforcement of arbitral awards.¹⁵⁸ No notable cases arose under the arbitration exception to the FSIA in 2009.

F. Terrorism – § 1605A, § 1605 (a)(7), and other claims

In 2009, courts addressed the amendments to the “terrorism exception”, which were enacted in 2008 as part of the National Defense Authorization Act for Fiscal Year 2008 (“NDAA”).¹⁵⁹ The amendments replaced § 1605(a)(7) of the FSIA with the new “terrorism exception,” codified at § 1605A. Under both § 1605(a)(7) and the new provision, § 1605A, foreign states designated by the U.S. Department of State as state sponsors of terrorism (and their agencies and instrumentalities) are stripped of sovereign immunity for certain terrorist acts as long as the state is designated as a “state sponsor of terrorism” either at the time of the terrorist act or at some later time as a result of the act which is the subject of the suit.¹⁶⁰ For defendants’ conduct to fall within this exception, they must have participated in an “act of torture, extrajudicial killing, aircraft sabotage, hostage taking” or provided “material support or resources for such an act.”¹⁶¹ Plaintiffs must also prove causation and damages.¹⁶² Among the most significant recent changes to the “terrorism exception,” the statute now (a) expressly provides plaintiffs with a federal statutory cause of action against state sponsors of terrorism;¹⁶³ and (b) allows plaintiffs to seek punitive damages.¹⁶⁴

1. Implementation of § 1605A

New Federal Statutory Cause of Action. Perhaps the most notable of terrorism exception amendments is the provision establishing a federal statutory cause of action.¹⁶⁵ Before enactment of the 2008 NDAA, Plaintiffs were required to assert their claims under state law, which, in many cases, resulted in a lack of uniformity between judgments and “significant disparities with respect to the availability of relief for similarly situated plaintiffs.”¹⁶⁶ In 2009, courts clarified the elements of the new federal private cause of action by “rely[ing] on well-established principles of law, such as those found in Restatement (Second) of Torts and other

¹⁵⁸ 28 U.S.C. § 1605(a)(6).

¹⁵⁹ Pub. L. No. 110-181, 122 Stat. 3.

¹⁶⁰ Currently, that list consists of Cuba, Iran, Sudan, and Syria. Countries that were once on the list but have since been removed include Iraq, Afghanistan, North Korea, South Yemen, and Libya.

¹⁶¹ 28 U.S.C. § 1605A(a)(1).

¹⁶² *Id.* § 1605A(c).

¹⁶³ 28 U.S.C. § 1605A(c).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *In re Iran Terrorism Litig.*, 659 F. Supp. 2d at 77.

leading treatises, as well as those principles that have been adopted by the majority of state jurisdictions.”¹⁶⁷

One case provided a clear demonstration of how the new federal statutory cause of action increased plaintiffs’ ability to recovery. In *Estate of Heiser v. Islamic Republic of Iran*, plaintiffs’ claims for emotional distress had been rejected as impermissible under applicable state law. Allowing plaintiffs to proceed under § 1605(c), the United States District Court for the District of Columbia applied § 1605A and allowed claims for intentional infliction of emotional distress.¹⁶⁸

Punitive Damages. Section 1605A allows plaintiffs to recover punitive damages against state sponsors of terrorism.¹⁶⁹ In 2009, two courts issued judgments against Iran for punitive damages, for its role in the 1984 bombing of the United States Embassy in Lebanon that killed 14 people and wounded 35,¹⁷⁰ and the 1996 bombing of a residential complex on a U.S. military base in Saudi Arabia that killed 19 members of the Air Force.¹⁷¹ In each case, the court awarded plaintiffs \$300 million in punitive damages, on the basis that the sum is triple Iran’s annual expenditure on terrorism.¹⁷²

Limitations on New § 1605A Claims. Section 1605A does not automatically apply to claims pending before courts under § 1605(a)(7).¹⁷³ Rather, § 1083(c) of the NDAA provides that pending claims relying upon § 1605(a)(7) could be “given effect as if the action had originally been filed under section 1605A(c),” if the claims were re-filed within 60 days of the enactment of § 1605A.¹⁷⁴ The amendments also allow plaintiffs to file “new” claims that are “related” to a prior action – *i.e.*, arise from the same act or incident – that was timely brought under § 1605(a)(7).¹⁷⁵ Related actions are also subject to the same 60-day time limit for filing and thus must have been filed by March 28, 2008.¹⁷⁶

There has been a great deal of confusion about the retroactivity provisions. In the consolidated actions *In re Iran Terrorism Litigation*, some plaintiffs with pending § 1605(a)(7) claims filed new claims as “related actions,”¹⁷⁷ while others filed a motion to “give effect” under

¹⁶⁷ *Id.* at 61; *see also Estate of Heiser v. Islamic Rep. of Iran*, 659 F. Supp. 2d 20, 23-24 (D.D.C. 2009).

¹⁶⁸ *Heiser*, 659 F. Supp. 2d at 25-27.

¹⁶⁹ 28 U.S.C. § 1605A(c).

¹⁷⁰ *Brewer v. Islamic Republic of Iran*, 664 F. Supp. 2d 43, 46 (D.D.C. 2009).

¹⁷¹ *Heiser*, 659 F. Supp. 2d at 1.

¹⁷² *Id.* at 29-30; *Brewer*, 664 F. Supp. at 57-59.

¹⁷³ *Simon v. Republic of Iraq*, 529 F.3d 1187, 1192 (D.C. Cir. 2008); *Gates v. Syrian Arab Republic*, 646 F. Supp. 2d 79, 89-90 (D.D.C. 2009).

¹⁷⁴ Pub. L. No. 110-181 § 1083(c)(2), 122 Stat 3 (2008).

¹⁷⁵ *Id.*

¹⁷⁶ *Baumel v. Syrian Arab Republic*, 667 F. Supp. 2d 39, 45-46 (D.D.C. 2009) (citing § 1083(c)(2)(C)(ii)).

¹⁷⁷ 659 F. Supp. 2d at 98-100.

1083(c)(2) in their pending cases.¹⁷⁸ Several others used the “belt and suspenders” approach of bringing claims under both 1083(c)(2) and (c)(3).¹⁷⁹ In most cases, the court permitted the claims to go forward as long as plaintiffs complied with the 60-day filing requirement.¹⁸⁰ The court observed what many plaintiffs had been dealing with since the amendment—“a good deal of confusion regarding how parties should avail themselves of the benefits of the new statute.”¹⁸¹

Constitutionality. As courts apply this new statutory scheme, many constitutional concerns have emerged, but so far, the NDAA and § 1605A have withstood constitutional scrutiny. In *Rux v. Republic of Sudan*, the United States District Court for the Eastern District of Virginia rejected an argument that the amendments to the terrorism exception violate equal protection because they create arbitrary distinctions “depending on when and how a particular plaintiff files suit.”¹⁸² The plaintiffs in *Rux* had been barred from amending their complaints to add a § 1605A claim because their original claim had not “relied upon § 1605(a)(7).”¹⁸³

The *Rux* court found that the plaintiffs could have timely brought a new “related action” pursuant to § 1083(c)(3).¹⁸⁴ It further found that the distinction between the plaintiffs and those who could amend their complaints because their initial complaint relied on § 1605(a)(7) survived rational basis review.¹⁸⁵ The court reasoned that, unlike claimants who had originally relied on § 1605(a)(7), the plaintiffs who did not assert a federal cause of action could have already secured a judgment under state law or federal statutory law pursuant to the pass-through provision set forth in § 1606.¹⁸⁶ Indeed, some of the plaintiffs in *Rux* had secured a monetary judgment under the Death on the High Seas Act.¹⁸⁷ Furthermore, the court noted that allowing plaintiffs who already obtained judgment to add a new cause of action to their complaints would cause constitutional and procedural problems.¹⁸⁸

A larger constitutional concern has stemmed from challenges based on the separation of powers doctrine.¹⁸⁹ The *Rux* court cautioned that separation-of-powers issues “lurked” because

¹⁷⁸ *Id.* at 100-103.

¹⁷⁹ *Id.* at 92-98.

¹⁸⁰ *Id.* at 92-100.

¹⁸¹ *Id.* at 66.

¹⁸² 672 F. Supp. 2d 726, 737 (E.D. Va. 2009).

¹⁸³ *Id.* at 735.

¹⁸⁴ *Id.* at 736.

¹⁸⁵ *Id.* at 736-38.

¹⁸⁶ *Id.* at 737.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *See Gates*, 646 F. Supp. 2d at 88 (rejecting the argument that the NDAA violates the separation of powers doctrine because Congress or the President may rescind judgments, as Congress has the power to define the jurisdiction of the lower federal courts).

the NDAA “undermines the independence of the Article III courts and the finality of their decisions” by requiring federal courts to reopen final judgments in certain cases.¹⁹⁰ The court in the *Iran Terrorism Litigation* expressed similar concerns that “this enactment offends deeply entrenched constitutional principles relating to the separation of powers and the ability of the judiciary to function independently without interference from the political process.”¹⁹¹ Nonetheless, because § 1605A is “a fundamentally different law” than § 1605(a)(7), and because of the unique context of the FSIA, that court found that “§ 1083(c)(3) does not direct the reopening of final judgments in violation of Article III,” and accordingly that “the waiver of *res judicata* and collateral estoppel in § 1083(c)(2)(B) should also withstand constitutional scrutiny under the narrow facts of these cases.”¹⁹² The court also suggested that the NDAA does not raise due process concerns, because foreign states do not have due process rights.¹⁹³

Call to Action: District Court Takes on the NDAA and FSIA. In addition to addressing the NDAA’s 60-day limitation and the constitutional concerns implicated by the statute, *In re Iran Terrorism Litigation* addressed multiple issues raised by the new legislation and the FSIA generally.¹⁹⁴ In a 191-page decision, Judge Lamberth of the United States District Court for the District of Columbia criticized the “terrorism exception,” concluding: “Civil litigation against Iran under the FSIA state sponsor of terrorism exception represents a failed policy.”¹⁹⁵

The court’s criticisms centered around plaintiffs’ struggle to obtain any actual relief against Iran because of the difficulty of locating and obtaining Iranian assets.¹⁹⁶ The court lamented the inequitable result whereby victims with more powerful advocates had won races to the courthouse and to Congress to obtain funds under the Victims of Trafficking and Violence Protection Act of 2000.¹⁹⁷ The court also noted that the FSIA’s interference with the president’s foreign policy prerogatives had placed victims of terrorism in the middle of a political battle, turning courts into “powerless and frustrated bystander[s]” that have expended judicial resources to address complex questions of law without any real results for victims.¹⁹⁸ As a result, the court called for Congress and the President to place these claims before a claims commission, and invited the government to participate in the consolidated action before it.¹⁹⁹

¹⁹⁰ 672 F. Supp. 2d at 736.

¹⁹¹ 659 F. Supp. 2d at 68-69.

¹⁹² *Id.* at 82.

¹⁹³ *Id.* at 86-88.

¹⁹⁴ *In re Islamic Republic of Iran Terrorism Litig.*, 659 F. Supp. 2d 31 (D.D.C. 2009).

¹⁹⁵ *Id.* at 37.

¹⁹⁶ *Id.* at 49-58, 120-25.

¹⁹⁷ *Id.* at 56-57, 124 (citing Pub. L. No. 106-386, § 2002, 114 Stat. 1464, 1541 (2000)).

¹⁹⁸ *Id.* at 124-28.

¹⁹⁹ *Id.* at 129-34, 137.

2. Dismissal of Claims Against Specific Nations

Iraq. In 2003, after the overthrow of Saddam Hussein’s regime, Congress passed the Emergency Wartime Supplemental Appropriations Act (“EWSAA”),²⁰⁰ which in § 1503 authorized the president to make the FSIA’s § 1605(a)(7) “inapplicable” to Iraq. The president later exercised this waiver authority and restored Iraq’s sovereign immunity.²⁰¹ Nonetheless, in the 2004 case *Acree v. Republic of Iraq*,²⁰² the D.C. Circuit held that the president’s EWSAA authority did not permit him to waive § 1605(a)(7) for claims arising out of acts Iraq had taken while designated as a sponsor of terrorism.²⁰³ While acknowledging that it was “an exceedingly close question,”²⁰⁴ the court held that “[t]here is nothing in the language of § 1503, the EWSAA as a whole, or its legislative history to suggest that Congress intended by this statute to alter the jurisdiction of the federal courts under the FSIA.”²⁰⁵

The 2008 NDAA again gave the president waiver authority,²⁰⁶ which he subsequently exercised by waiving “all provisions of section 1083 of the Act with respect to Iraq.”²⁰⁷ It also inserted a provision purporting to ratify *Acree* by providing that nothing in the EWSAA divested the courts’ jurisdiction under the FSIA.²⁰⁸ However, in the 2009 case *Republic of Iraq v. Beaty*, the Supreme Court unanimously overturned *Acree* and held that Iraq is no longer subject to suit under the FSIA’s terrorism exception. The Court employed what it considered to be a straightforward application of the EWSAA’s language and held that once the president waived the application of § 1605(a)(7) to Iraq, courts lost jurisdiction over all pending cases against Iraq.²⁰⁹ The Court further held that the NDAA did not affect this analysis because the president’s waiver encompassed the section purporting to limit the EWSAA’s effect.²¹⁰

Libya. In 2008, the U.S. accepted a \$1.5 billion payment from Libya as a resolution of all claims brought by victims of Libya-sponsored terrorism and removed Libya from the state sponsor of terrorism list. Congress likewise passed the Libyan Claims Resolution Act, which

²⁰⁰ Pub. L. No. 108-11 (2003), 117 Stat. 559 (2003).

²⁰¹ *Republic of Iraq v. Beaty*, 129 S. Ct. 2183, 2187 (2009) (citing 68 Fed. Reg. 26459).

²⁰² 370 F.3d 41 (D.C. Cir. 2004).

²⁰³ *Id.* at 48.

²⁰⁴ *Id.* at 51.

²⁰⁵ *Id.* at 57.

²⁰⁶ *Beaty*, 129 S. Ct. at 2188 (citing § 1083(d)).

²⁰⁷ *Id.* at 2188 (quoting 73 Fed. Reg. 6571 (2008)).

²⁰⁸ *Id.* at 2187 (citing § 1083(c)(4), 122 Stat. 343).

²⁰⁹ *Id.* at 2190-91, 2194.

²¹⁰ *Id.* at 2192.

divested courts of jurisdiction over these claims and authorized the State Department to designate procedures for providing fair compensation.²¹¹

In 2009, certain plaintiffs objected to the dismissal of their terrorism-related claims against Libya in federal court on the basis that the State Department's procedures provided inadequate compensation, and, thus, plaintiff suffered an unconstitutional taking under the Fifth Amendment.²¹² The courts rejected this argument, finding that a takings claim against the United States, which was not a defendant in the case at hand, did nothing to defeat the fact that the court was divested of jurisdiction over their claims against Libyan defendants.²¹³

G. Counterclaim – § 1607

The FSIA also bars a foreign state from claiming immunity with respect to any counterclaim:

(a) for which a foreign state would not be entitled to immunity under section 1605 or 1605A . . . had such claim been brought in a separate action against the foreign state; or

(b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or

(c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.²¹⁴

In *Reino de España v. ABSG Consulting, Inc.*,²¹⁵ Spain sued defendants ABSG Consulting, Inc. (ABS), under American general maritime and Spanish law for damages resulting from the *M.T. Prestige* oil spill. ABS filed counterclaims for indemnification and contribution relating to liability for the same oil spill. The Second Circuit held that Spain was not entitled to immunity with respect to the defendants' counterclaim because, pursuant to § 1607(b), the counterclaims bore a "logical relationship" to the subject matter of the affirmative claim because they raised "similar, if not identical, issues of duty and causation."²¹⁶ The court found that the "result fully accords with the purpose behind 28 U.S.C. § 1607(b): to prevent a foreign sovereign from obtaining the benefit of litigating its claims in a United States court while simultaneously avoiding liability for counterclaims logically related to them."²¹⁷

²¹¹ Pub. L. No. 110-301, 122 Stat. 2999 (2008).

²¹² *Harris v. Socialist People's Libyan Arab Jamahiriya*, 620 F. Supp. 2d 1, 4 (D.D.C. 2009); *Clay v. Socialist People's Libyan Arab Jamahiriya*, 614 F. Supp. 2d 21, 24 (D.D.C. 2009).

²¹³ *Harris*, 620 F. Supp. 2d at 4; *Clay*, 614 F. Supp. 2d at 24-25.

²¹⁴ 18 U.S.C. § 1607.

²¹⁵ Nos. 08-0579-cv(L), 08-0754-cv(XAP), 2009 WL 1636122 (2d Cir. June 12, 2009).

²¹⁶ *Id.* at *2.

²¹⁷ *Id.*

IV. Enforcement of Awards Against Foreign Sovereigns

The FSIA can also protect a foreign sovereign's property from attachment or execution.²¹⁸ But this protection is not absolute. Section 1610 provides several limited exceptions to the immunity of a foreign sovereign's assets from attachment. In 2009, two of these exceptions were addressed by the courts: the commercial activity exception and the terrorism exception.

A. The Commercial Activity Exception to Immunity from Attachment

A claimant must satisfy two elements to invoke the commercial activity exception to a foreign sovereign's immunity from attachment: First, the foreign state's property must be "property in the United States," and, second, the property "must have been used for a commercial activity at the time the writ of attachment or execution is issued."²¹⁹

In *Aurelius Capital Partners, LP v. Republic of Argentina*, the Second Circuit held that the fact that the property of a foreign state *will* be used or *could potentially* be used for a commercial activity was not sufficient to satisfy the second "commercial activity" element.²²⁰ Instead, the foreign nation's property in the United States "*must be used* for a commercial activity in the United States upon a judgment entered by a court of the United States or of a State."²²¹ In the *Aurelius* case, the Republic of Argentina had "defaulted on payments on debt instruments issued to bondholders."²²² As a result, the plaintiffs obtained judgments against the Republic, but were then unable to recover on these judgments.²²³ Later, in 2008, the President of Argentina decided to integrate "private pension funds, held and managed on behalf of Argentine workers and pensioners," into the Republic's social security system.²²⁴ The plaintiffs then brought suit against Argentina, seeking to attach the money in these funds as recovery for the previously secured judgments.²²⁵ The Second Circuit held that "in the hands of the Republic," the property was not being used for a commercial activity.²²⁶ More specifically, the court held that "a sovereign's mere transfer to a governmental entity of legal control over an asset does not

²¹⁸ 28 U.S.C. § 1609.

²¹⁹ *Id.*

²²⁰ *Aurelius Capital Partners, LP v. Republic of Argentina*, 584 F.3d 120, 129-30 (2d Cir. 2009).

²²¹ *Id.* at 130 (internal quotes omitted) (emphasis added).

²²² *Id.* at 124-26.

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.* at 130-31.

qualify the property as being ‘used for a commercial activity.’²²⁷ Thus, the court held that the pension funds were immune from attachment.²²⁸

B. The Terrorism Exception: Terrorism Risk Insurance Act (“TRIA”) and Blocked Assets

TRIA, enacted in 2002, permits terrorism victims with judgments under § 1605(a)(7) to satisfy their judgments for compensatory damages from blocked assets of terrorists, terrorist organizations, and State sponsors of terrorism.²²⁹

In 2009, in *Ministry of Defense & Support for the Armed Forces of the Islamic Republic of Iran v. Elahi*, the U.S. Supreme Court addressed the question whether a judgment obtained by Iran against a U.S. company was “a ‘blocked asset’” as defined by the TRIA.²³⁰ The plaintiff sought to execute a judgment against Iran for compensatory damages arising under the terrorism exception to the FSIA and filed a notice of lien against a \$2.8 million judgment that Iran had obtained against a California company called Cubic Defense Systems, Inc. Iran claimed that the asset was immune from attachment, claiming that the judgment is not a “blocked asset” under TRIA.²³¹

The court of appeals had held that the Cubic Judgment arose out of a pre-1981 contract with Iran involving an air combat training system for Iran, and that President Carter had blocked virtually all Iranian assets following the Iran hostage crisis. The court of appeals found that the President had never unblocked the assets in question.

The Supreme Court reversed, holding that the asset at issue was not the air combat training system, but rather the Cubic Judgment and the sale proceeds – neither of which were “blocked assets” at the time the court of appeals decision.²³² The 1981 order issued by the Treasury Department authorized “[t]ransactions involving property in which Iran . . . has an interest[,] where the interest in the property . . . arises after January 19, 1981.”²³³ The Supreme Court held that Iran’s interest in the Cubic Judgment arose on December 7, 1998, when the district court confirmed the arbitration award, and thus falls within the terms of the Treasury order.²³⁴ Further, the Court held that Iran’s interest in the property underlying the Cubic Judgment arose after January 19, 1981, because Iran agreed it would take a final decision about ownership of the property after Cubic completed its sale of the system, which was in October

²²⁷ *Id.* at 131 (internal quotes omitted).

²²⁸ *Id.*

²²⁹ Pub. L. No. 107-297, § 201, 116 Stat. 2337 (2002). See *Bennett v. Islamic Republic of Iran*, 604 F. Supp. 2d 152, 161 (D.D.C. 2009).

²³⁰ 129 S. Ct. 1732, 1735 (2009).

²³¹ *Id.*

²³² *Id.* at 1739.

²³³ *Id.* (emphasis in original and citation omitted).

²³⁴ *Id.*

1982. Finally, the Court found that, even if the relevant asset were Iran's pre-1982 interest in the air combat training system itself, the asset was not blocked at the time of the court of appeals decision because the interest falls directly within the scope of an executive order that required property owned by Iran to be transferred as directed by the Iran government.²³⁵

In *Bennett v. Islamic Republic of Iran*, the United States District Court for the District of Columbia held that diplomatic properties in the U.S. owned by Iran are not "blocked assets" under TRIA.²³⁶ The court rejected plaintiff's claim that the 2008 NDAA extended "blocked assets" to include diplomatic properties.²³⁷

V. Practical Issues in FSIA Litigation

A number of FSIA judicial decisions from 2009 also provide useful guidance concerning some of the practical procedural issues that arise in cases brought against foreign sovereigns including service of process personal jurisdiction, discovery and removal. A brief review of certain notable decisions follows.

A. Service of Process

Service under the FSIA is governed by 28 U.S.C. §§ 1608(a) and (b). Those provisions set forth various acceptable methods of service, depending on whether the party being served is: (a) a foreign state or political subdivision; or (b) an agency or instrumentality.

Service of process on foreign sovereigns under the FSIA is governed by section 1608(a), which requires using the designated methods of service set forth in the statute, *in order – i.e.*, using the next method only if all preceding methods are not available – as follows: (1) in accordance with a special arrangement between the plaintiff and the foreign state; (2) in accordance with an applicable international convention on service; (3) by mail, return receipt required, from the clerk of the court to the foreign state's ministry of foreign affairs; or (4) by diplomatic channels through the State Department in Washington, D.C.²³⁸ Courts have held that because Congress expressly created a sequential method of service, any deviation from this strict

²³⁵ In addition, the Supreme Court held that even if the assets were "blocked," the plaintiff had waived his right to attach the property at issue when the plaintiff signed a waiver to relinquish "all rights to execute against or attach property that is at issue in acclaims against the United States before an international tribunal [or] that is the subject of awards rendered by such tribunal," in return for partial compensation by the U.S. government for the claim against Iran under a claims compensation scheme. *Id.* at 1741

²³⁶ *Bennett*, 604 F. Supp. 2d at 160-62.

²³⁷ *Id.*

²³⁸ See, e.g., *Smith v. Ghana Commercial Bank, Ltd.*, No. 08-5324, 2009 WL 3327206, at *4 (D. Minn. Oct. 13, 2009) (finding that service in accordance with Rule 4(f)(2) was impermissible method of service on Republic of Ghana).

sequential order without proper basis renders the service facially invalid.²³⁹ Sequential requirements also exist for service on agencies and instrumentalities under section 1608(b).

One issue that arose in 2009 was whether who amended a complaint to add a claim under the amendments to the terrorism exception, § 1605A, must re-serve the complaint. In *Gates v. Syrian Arab Republic*, the United States District Court for the District of Columbia held that to the extent plaintiffs asserted a new cause of action against Syria under § 1605A, they should have served Syria pursuant to Federal Rule of Civil Procedure 5(a)(2), which requires that new claims be served on defaulting parties.²⁴⁰ The plaintiffs argued that their original complaint had included an “allegation of a federal cause of action against Syria, a claim for solatium, and a claim for punitive damages,” and, thus, the new complaint would assert the same claims.²⁴¹ The court disagreed, stating that if plaintiffs were to proceed under § 1605A, the complaint should be amended and re-served.²⁴²

However, another judge in the same District arrived at a different conclusion. In *In re Islamic Republic of Iran Terrorism Litigation*, Judge Lamberth concluded that precedent “strongly suggest[ed] that service is not required in actions that were pending under § 1605(a)(7) and which have since been converted to § 1605A through the procedures in § 1083(c) of the 2008 NDAA.”²⁴³ As the court explained, “even though actions converted to § 1605A are now presenting what are new claims in the sense that the substantive law is now federal law, they need not be considered as new claims for purposes of the pleading requirements applicable to these actions.”²⁴⁴ The court acknowledged the *Gates* decision of the previous month, but disagreed with the reasoning in that case for two reasons. First, the Court concluded that it was not clear that Federal Rule of Civil Procedure 5 applies to actions against foreign sovereigns, since § 1608 establishes specific rules governing service of process as to such defendants. In addition, the Court noted that, by its own terms, Rule 5(a)(2) only requires service where a new claim is presented in a pleading; motions under § 1083(c)(2), the NDAA provision permitting retroactive claims against foreign state sponsors of terrorism, do not constitute “pleadings” within the meaning of Rule 5.²⁴⁵

²³⁹ See, e.g., *Sabbithi v. Al Saleh*, 623 F. Supp. 2d 93 (D.D.C. 2009) (dismissing claim against Kuwait because plaintiffs served defendant by diplomatic means under § 1608(a)(4) but could not demonstrate impossibility of service under first three methods).

²⁴⁰ *Gates v. Syrian Arab Republic*, 646 F. Supp. 2d 79, 89 (D.D.C. 2009).

²⁴¹ *Id.* at 89.

²⁴² *Id.* at 91.

²⁴³ *In re Islamic Republic of Iran Terrorism Litigation*, 659 F. Supp. 2d 31, 104 (D.D.C. 2009) (citing *Dammarell v. Islamic Republic of Iran*, 370 F. Supp. 2d 218 (D.D.C. 2005), and *Bodoff v. Islamic Republic of Iran*, 424 F. Supp. 2d 74 (D.D.C. 2006)).

²⁴⁴ *Id.* at *106.

²⁴⁵ *Id.*; see also *Belkin v. Islamic Republic of Iran*, 667 F. Supp. 2d 8, 20 (D.D.C. 2009) (holding that plaintiff need not re-serve Complaint asserting claims under § 1605A).

B. Personal Jurisdiction

The FSIA confers personal jurisdiction as well as subject matter jurisdiction over certain claims against foreign sovereigns. As a general rule, the FSIA confers personal jurisdiction over foreign sovereigns where subject matter jurisdiction has been established and service of process has been accomplished pursuant to 28 U.S.C. § 1608.²⁴⁶ However, it remains an open question whether courts also must consider the traditional constitutional due process requirements – *i.e.*, that there be “sufficient minimum contacts between the foreign state and the forum such that maintenance of the suit does not offend traditional notions of fair play and substantial justice.”²⁴⁷

In 2009, in *Frontera Resources Azerbaijan Corp. v. State Oil Company of the Azerbaijan Republic*,²⁴⁸ the Second Circuit joined the D.C. Circuit and the majority of other jurisdictions which have considered this question²⁴⁹ and held that foreign states are not persons protected by the Fifth Amendment and thus do not enjoy constitutional due process rights that may be invoked as a defense in FSIA proceedings.

C. Default Judgments

If a foreign sovereign is properly served with a complaint but refuses to answer, move or otherwise respond, the court may, in its discretion, grant a default judgment in favor of the plaintiff.²⁵⁰ Such judgments are not uncommon in foreign sovereign litigation, as foreign states often choose to ignore claims asserted against them in U.S. courts, for political, economic, practical, or other reasons.²⁵¹

²⁴⁶ See, e.g., *Box v. Dallas Mexican Consulate Gen.*, No. 3:08 – CV – 1010 - 0, 2009 WL 3163551, at *4 (N.D. Tex. Sept. 30, 2009).

²⁴⁷ *Shapiro v. Republic of Bolivia*, 930 F.2d 1013, 1020 (2d Cir. 1991) (citing *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 316 (1945)).

²⁴⁸ *Frontera Res. Azerbaijan Corp. v. State Oil Co. of the Azerbaijan Republic*, 582 F.3d 393, 399 (2d Cir. 2009) (citing D.C. Circuit’s reasoning in *Price* as reasoning for its holding).

²⁴⁹ See, e.g., *Price v. Socialist People’s Libyan Arab Jamahiriya*, 294 F.3d 82 (D.C. Cir. 2002); *Cassirer v. Kingdom of Spain*, 461 F. Supp. 2d 1157, 1168 (C.D. Cal. 2006); *Rux v. Republic of Sudan*, No. Civ. A. 2:04CV428, 2005 WL 2086202, at *18 (E.D. Va. Aug. 26, 2005); *Cruz v. United States*, 387 F. Supp. 2d 1057, 1067 (N.D. Cal. 2005); *Altmann v. Republic of Austria*, 142 F. Supp. 2d 1187, 1207 (C.D. Cal. 2001); *O’Bryan v. Holy See*, 471 F. Supp. 2d 784, 794 (W.D. Ky. 2007).

²⁵⁰ See, e.g., *Lasheen v. Loomis Co.*, No. 01-0227, 2008 WL 2880408, at *3 (E.D. Cal. July 22, 2008).

²⁵¹ See, e.g., *Gates v. Syrian Arab Republic*, 646 F. Supp. 2d 79 (D.D.C. 2009); *Butler v. Sukhoi Co.*, 579 F.3d 1307 (11th Cir. 2009); *Belkin v. Islamic Republic of Iraq*, 667 F. Supp. 2d 8 (D.D.C. 2009); *Box v. Dallas Mexican Consulate*, No. 3:08-CV-1010-0, 2009 WL 3163551 (N.D. Tex. Sept. 30, 2009); *Acree v. Republic of Iraq*, 658 F. Supp. 2d 124 (D.D.C. 2009). One court also upheld a default judgment against the Palestinian Authority, which had belatedly asserted sovereign immunity. *Estates of Ungar v. Palestinian Auth.*, 613 F. Supp. 2d 219 (D.R.I. 2009). Where a sovereign makes a limited appearance, however, courts will likely decline to enter a default judgment. See *Smith v. Ghana Commercial Bank, Ltd.*, No. 08-5324, 2009 WL 3327206, at *10 (D. Minn. Oct. 13, 2009) (refusing to enter default judgment where defendants had made limited appearance indicating intention to defend against claims).

Under the FSIA “[n]o judgment by default shall be entered . . . against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court.”²⁵² Moreover, “[u]pon evaluation, the Court may accept any uncontroverted evidence presented by plaintiffs as true.”²⁵³ Nevertheless, courts have noted that default judgments are a “sanction of last resort” and that “there is a strong policy favoring the adjudication of a case on its merits,”²⁵⁴ particularly where the defendant is a foreign sovereign. As one court noted, “intolerant adherence to default judgments against foreign states could adversely affect” U.S. foreign relations.²⁵⁵

Once a default judgment has been entered, a foreign sovereign may seek relief under Federal Rule of Civil Procedure 60(b), which permits judgments to be overturned under certain circumstances, including mistake or excused neglect; newly discovered evidence; fraud; or other reasons justifying relief.

Foreign sovereigns may, however, find it difficult to obtain relief under this rule. For example, in *The Estates of Yaron Ungar v. The Palestinian Authority*,²⁵⁶ the United States District Court for the District of Rhode Island declined to vacate a default judgment issued against the Palestinian Authority and Palestinian Liberation Organization. In that case, the defendants filed a motion to dismiss the initial complaint, but failed to respond to an amended complaint.²⁵⁷ In refusing to allow defendants to set aside the \$116 million default judgment entered against them, the First Circuit noted that sovereign immunity is not a “trump card that may be held in reserve until a defendant sees fit to play it.”²⁵⁸ In denying the request to vacate the judgment, the court stressed the fact that courts are hesitant to overturn judgments under Rule 60(b) absent a showing that the opposing party would suffer no prejudice.²⁵⁹ Here, if the request were granted, the court explained, it “would be extremely prejudicial to the Plaintiffs because they would be unable to conduct much of the crucial discovery that would have been possible years ago when they first requested it.”²⁶⁰ The court therefore rejected the request for relief.

On the other hand, in *Acree v. Republic of Iraq*, the United States District Court for the District of Columbia granted the defendant’s request to set aside an entry of default judgment because it had “identified several potentially meritorious defenses.”²⁶¹ The court held that three

²⁵² 28 U.S.C. § 1608(e).

²⁵³ *Belkin v. Islamic Republic of Iran*, No. 667 F. Supp. 2d 8, 20 (D.D.C. 2009).

²⁵⁴ *Acree v. Republic of Iraq*, 658 F. Supp. 2d 124, 127 (D.D.C. 2009) (citations omitted).

²⁵⁵ *Id.* (internal citations omitted).

²⁵⁶ 613 F. Supp. 2d 219 (D.R.I. 2009).

²⁵⁷ *Id.* at 228.

²⁵⁸ *Id.* (quoting First Circuit decision in prior phase of proceedings).

²⁵⁹ *Id.* at 229.

²⁶⁰ *Id.*

²⁶¹ *Acree v. Republic of Iraq*, 658 F. Supp. 2d 124, 129 (D.D.C. 2009).

factors should be balanced in determining whether to set aside a default: whether the default was willful; whether it would prejudice the plaintiff; and whether the alleged defense was meritorious.²⁶² A meritorious defense, the court explained, was one that “contain[ed] even a hint of a suggestion which, proven at trial, would constitute a complete defense.”²⁶³ Iraq had raised several potentially viable defenses, including foreign sovereign immunity.²⁶⁴ Moreover, Iraq pointed out that significant issues relating to Iraq’s immunity were pending in the Supreme Court.²⁶⁵ The court held that, under these circumstances, the balance of factors favored setting aside the default judgment.²⁶⁶

D. Forum Non Conveniens

Under the doctrine of *forum non conveniens*, a U.S. court may decline to hear a claim if 1) allowing the claim would impose a serious inconvenience on the defendant and 2) there exists an adequate alternative forum for the claim to be heard. In 2009, courts in two cases declined to dismiss an action against a sovereign on *forum non conveniens* grounds.

In *UNC Lear Services, Inc. v. Kingdom of Saudi Arabia*,²⁶⁷ the Fifth Circuit found that the district court had not abused its discretion in declining to dismiss the action based on *forum non conveniens*. The appellate court agreed that, while there were adequate alternative fora, the balance of private and public interest factors did not strongly favor dismissal.²⁶⁸ Factors relating to privacy interests include relative ease of access to sources of proof, cost of attendance of witnesses, and other practical issues.²⁶⁹ Public interest factors include court congestion, local interest in having local controversies decided in local courts, and the forum’s familiarity with the applicable law.²⁷⁰ In the case at hand, witnesses were located in both fora and translation of documents would be required no matter which forum heard the case.²⁷¹ The court concluded that, while both the U.S. and Saudi Arabia had an interest in trying the case, the U.S. had a greater interest because most of the activity under the contract at issue took place in Texas.²⁷²

In *Figueiredo v. Republic of Peru*, the United States District Court for the Southern District of New York declined to dismiss an action seeking enforcement of an arbitral award

²⁶² *Id.* at 127 (citing *Jackson v. Beech*, 636 F.2d 831, 836 (D.C. Cir. 1980)).

²⁶³ *Id.* at 129 (internal citations omitted).

²⁶⁴ *Id.*

²⁶⁵ *Id.* (referring to Supreme Court’s decision in *Republic of Iraq v. Beatty*, 129 S. Ct. 2183 (2009)).

²⁶⁶ *Id.* at 130.

²⁶⁷ 581 F.3d 210 (5th Cir. 2009).

²⁶⁸ *Id.* at 221.

²⁶⁹ *Id.* at 220-21.

²⁷⁰ *Id.* at 221.

²⁷¹ *Id.*

²⁷² *Id.*

against Peru.²⁷³ The court found that Peruvian courts would not be an adequate forum since the plaintiff could not seek Peru's assets in the United States through an action in a Peruvian court. In addition, U.S. courts had "an interest in enforcing commercial arbitration agreements in international contracts."²⁷⁴

²⁷³ 655 F. Supp. 2d 361, 375 (S.D.N.Y. 2009).

²⁷⁴ *Id.* at 376.

